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IN THE

Supreme Court of the United States

October Term, 1964

NO. 716

INDUSTRIAL INSTRUMENT CORPORATION,
Petitioner

v.

THE FOXBORO COMPANY, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Your petitioner, Industrial Instrument Corporation, respectfully prays that this Court grant rehearing of its order of February 1, 1965, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition filed herein on November 23, 1964.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Rehearing is sought because this Court granted certiorari on January 18, 1965, in No. 580, *Graham, et al. v. John Deere Co. of Kansas City*. As discussed more fully hereinafter, this constitutes an intervening circumstance of substantial or controlling effect.

The *Graham* case presents to this Court the same issues as those presented in the petition for writ of certiorari in this case, to wit, the construction and application of the same statutes (35 U.S.C. §102 and 103) and procedural rule (Rule 52(a), F.R.C.P.). The propriety of granting the petition for rehearing and vacating the order denying certiorari in view of the intervening circumstance of the granting of certiorari in a co-pending case involving the same or similar issues was clearly established in *Jones v. Opelika*, 316 U.S. 584, wherein this Court stated: (316 U.S. at 589).

> "This Court denied certiorari, 314 U.S. 651, ante 522, 62 S.Ct. 99, but later, *because of the similarity of the issues*, presented to those in the Jobin case, No. 966, vacated the denial of certiorari and issued a writ. 315 U.S. 782, ante, 1189, 62 S.Ct. 903" (Emphasis added).

In the *Graham* case, the petition for writ of certiorari states at page 3 that the case involves, inter alia, Sections 102 and 103 of Title 35, United States Code, and Federal Rules of Civil Procedure No. 52. As has been fully presented in the petition for writ of certiorari in this case, it too involves the construction and application of the same statutes, as well as what findings should be made to

support conclusions of law under those statutes. The importance of this Court clarifying and settling the construction and application of these statutes and rule is emphasized by the direct conflict between the decisions of the Court of Appeals for the Fifth and Ninth Circuits. Compare *Industrial Instrument Corporation v. The Foxboro Company*, 335 F.2d 123 (5 Cir. 1964) with *National Lead Co. v. Western Lead Products Co.*, 291 F.2d 447 (9 Cir. 1961). Thus, the granting of certiorari in this case and its concurrent hearing with the companion *Graham* case would afford this Court an opportunity to resolve most, if not all, of the issues arising from the construction and application of Sections 102 and 103 of Title 35, United States Code, and the effect thereon of Rule 52(a), Federal Rules of Civil Procedure.

This Court has recognized that where two cases present issues involving the construction and application of the same statutes, and where certiorari has been granted in one case, it should be granted in the other. The Railway Labor Act and the Fair Labor Standards Act were before this Court in *Williams v. Jacksonville Terminal Company* and *Pickett v. Union Terminal Company*, 315 U.S. 386. In *Pickett*, the petition for certiorari was first denied (313 U.S. 591). Then certiorari was granted in *Williams* (314 U.S. 590). Upon rehearing, this Court vacated its prior order and granted certiorari in *Pickett* (314 U.S. 704), which enabled it to consider the companion cases at the same time.

A similar situation is present here. By following its action in *Williams* and *Pickett*, and granting certiorari herein, this Court will be in a position to decide the issues relating to the same statutes raised in this and the *Graham* cases. The

importance of these issues is established by the granting of certiorari in *Graham.*

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that this petition should be granted and the order denying certiorari vacated " . . . so that this case might be disposed of consistently with the companion case . . . " of No. 580, *Graham, et al. v. John Deere Co. of Kansas City. United States v. Ohio Power Co.*, 353 U.S. 98.

Respectfully submitted,

February ____, 1965

JOE E. EDWARDS
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

JOE E. EDWARDS
Counsel for Petitioner

CERTIFICATE OF SERVICE

Service of the foregoing petition for rehearing has been made upon respondent, The Foxboro Company, by mailing first class postage prepaid, a copy thereof to Mr. Garrett R. Tucker, Jr., of Baker, Botts, Shepherd & Coates, Esperson Building, Houston, Texas 77002; and by mailing air mail postage prepaid, a copy thereof to Mr. Edward G. Curtis, of Curtis, Morris & Safford, 530 Fifth Avenue, New York, New York 10036, its attorneys, this ____ day of February, 1965.

JOE E. EDWARDS
Counsel for Petitioner